

# Arnold Bloch Leibler

Lawyers and Advisers



## “Burying Work Choices” The Leverage Shift under Fair Work and Need for Reform

---

**Henry Skene** | Partner

T: +61 3 9229 9807 | F: +61 3 9916 9587 | M: 0411 478 758

hskene@abl.com.au | [www.abl.com.au](http://www.abl.com.au)

Not for circulation or publication without the prior written approval of Arnold Bloch Leibler Lawyers and Advisers. This presentation deals with general matters and should not be relied upon as advice in a particular context.

©ABL 2010 #1073342





## Key messages

---

### **Burying Work Choices:**

- Work Choices has been demonised by the Government to blunt critical appraisal of the Fair Work Act.
- The Work Choices stigma has allowed the Government to introduce sweeping workplace reform.

### **Shifting leverage:**

- The capacity of employers and employees to control workplace relations outcomes at the enterprise level has been significantly reduced.
- There is a need for a meaningful critical examination of various measures under Fair Work Act that do not reflect the needs of the modern workplace.



---

# What do we mean by burying Work Choices?





## The Work Choices stigma

---

*“Work Choices is a damaged brand.  
Anything bad that happens in the world is blamed on  
Work Choices.”*

**Phil Coorey & Jessica Irvine**

**‘Work Choices backlash sparks a war of words’  
*Sydney Morning Herald, 17 May 2007***



## The Work Choices stigma

---

“Any Coalition sign of not accepting Labor’s ripping up of John Howard’s industrial laws is immediately used to attack the Liberals as “the party of Work Choices”, with a secret agenda to restore “extreme industrial relations laws that ripped away workers’ pay and conditions”.”

**Dennis Shanahan**

**12 December 2008**



## The Work Choices stigma

---

“[Tony Abbott] wants to bring back the two things which made Work Choices what it was.

He wants to bring back the individual statutory employment agreements which were responsible for all the rip offs and he wants to take away unfair dismissal rights.”

**Julia Gillard**

**16 February 2010**



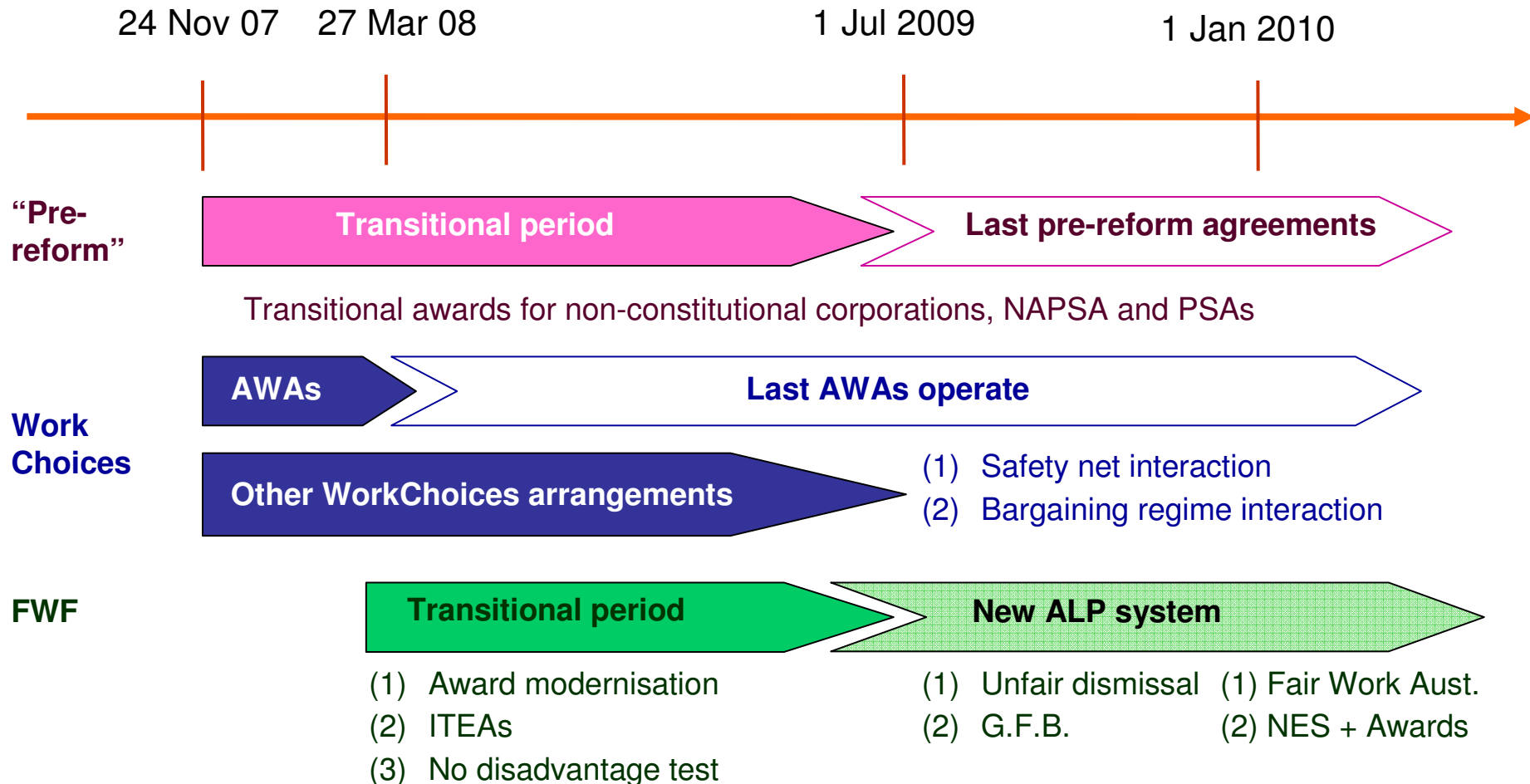
---

## Shifting Leverage: Context





# Road of Reform





## Government objectives

---

“In the Government’s view, we simply have to move beyond the destructive conflict-based model of workplace relations that was Work Choices and instead build a productive new workplace relations system based on promoting consultation and cooperation at the enterprise level.

Our intention has never been to tilt the balance unfairly in the opposite direction to Work Choices. It is to ensure the workplace relations pendulum is where it should be – the middle.”

**Julia Gillard**  
**8 August 2008**



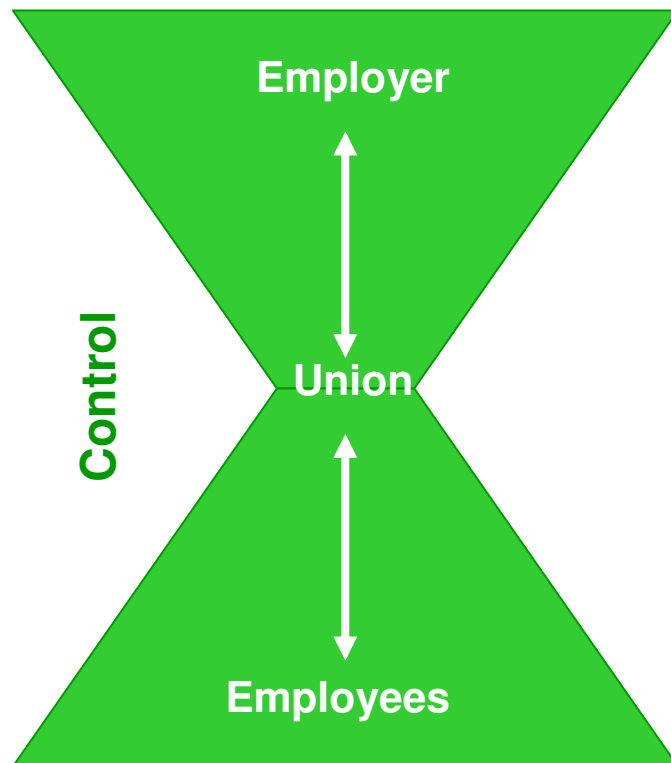
---

# Shifting Leverage: Examining Engagement



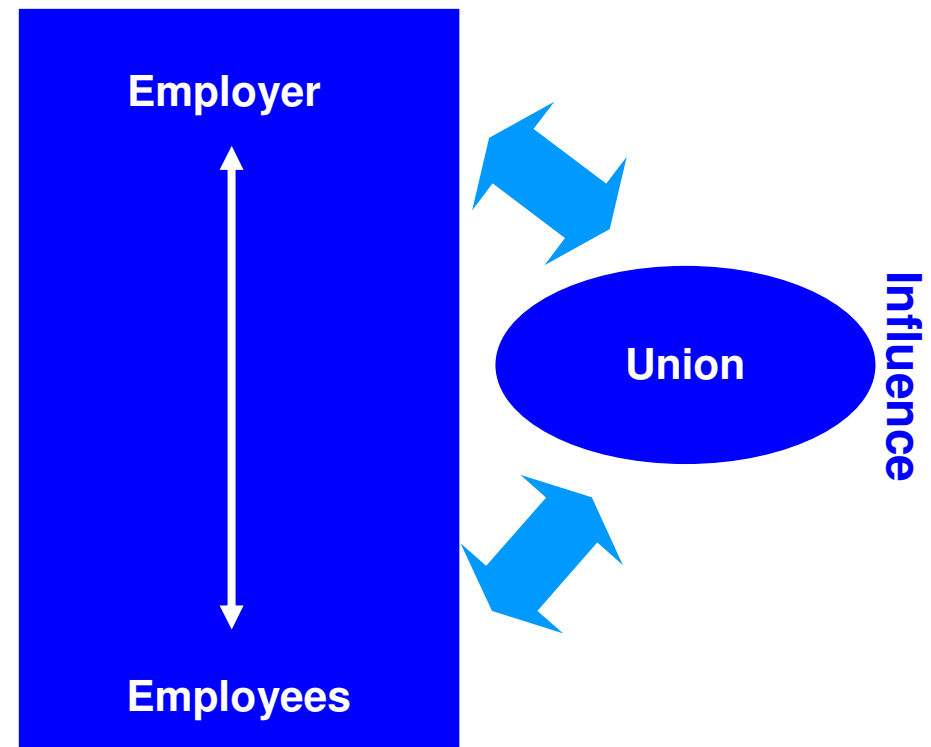
## Competing models of engagement

### Traditional:



VS

### Direct engagement:





## Potential engagement situations

---

### When does employer/union engagement arise?

- Entering the workplace
- Deciding who to negotiate with
- Participating in negotiations
- Exchanging information
- Deciding the scope of any agreement
- Making an agreement
- Deciding the parties to an agreement
- Consulting about change

**Key Lesson:**

A blue starburst graphic with multiple points, containing the text 'Shift in control'.

**Shift in  
control**



## Fair Work Act: key areas of change

---

- **Increased safety net: modern awards and the NES**
- **Expanded rights for union access**
- **New bargaining framework: good faith bargaining**
- **Expanded “general protections”**
- **New transfer of business rules**
- **Expanded unfair dismissal jurisdiction**



## What does the new engagement framework look like?

---

### Special measures relevant to union representatives:

- Increased union access to workplaces
- Increased union and employee control in bargaining
- Expanded obligations to consult and provide information
- Increased control over industrial action
- Expanded capacity for compulsory arbitration
- Expanded adverse action grounds

## Increased union access to workplaces

---

### Previous model:

Member or Eligible member\*



Award, Agreement or Order applies to the workplace

### New Approach:

Member or Eligible member\*

- More competition between unions: demarks
- Expanded access to premises
- Non-member records

Key Lesson:

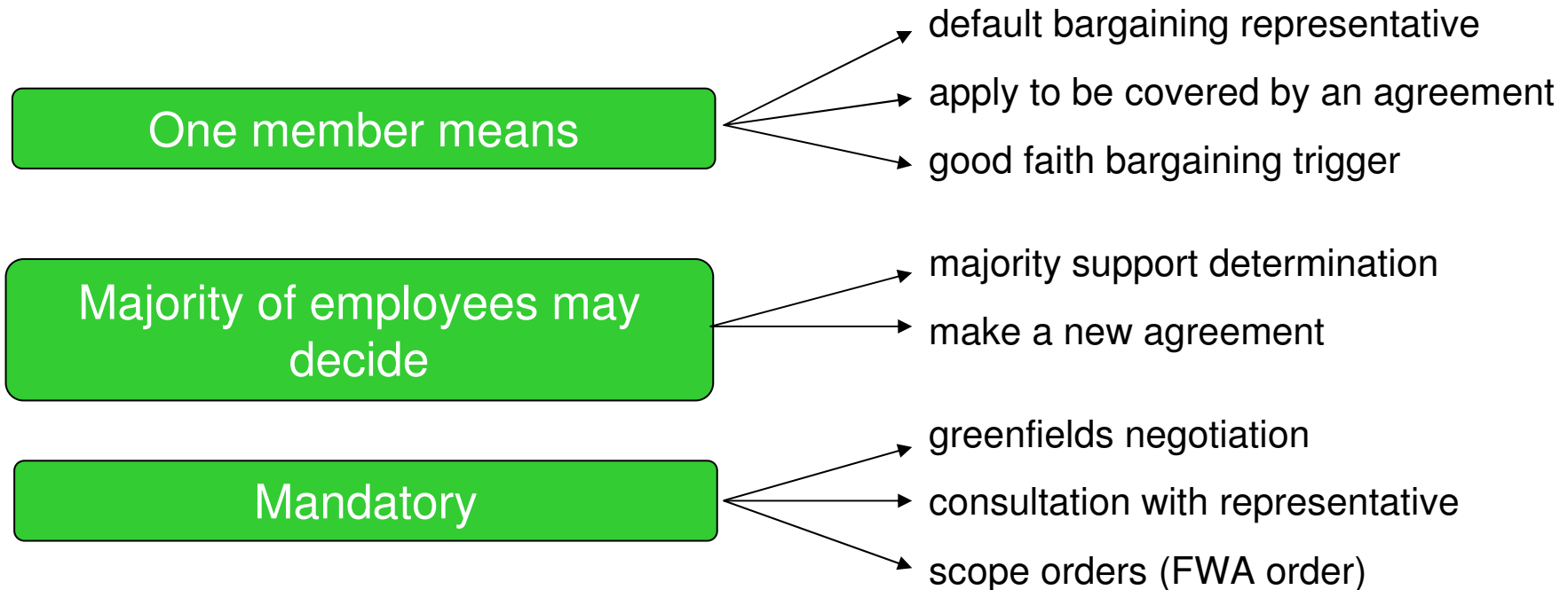
More unions can enter without past relationship

\* Depends on purpose of entry



## Expanded employee and union bargaining rights

---



Key Lesson:

**Unions and employees decide**

## Good faith bargaining obligations

### Good Faith Bargaining Obligations:

- Meet and confer
- Provide information
- Respond to proposals
- Give genuine consideration
- Not engage in capricious or unfair conduct

used by unions

delay to force concessions

used by employers

strategy to hold accountable

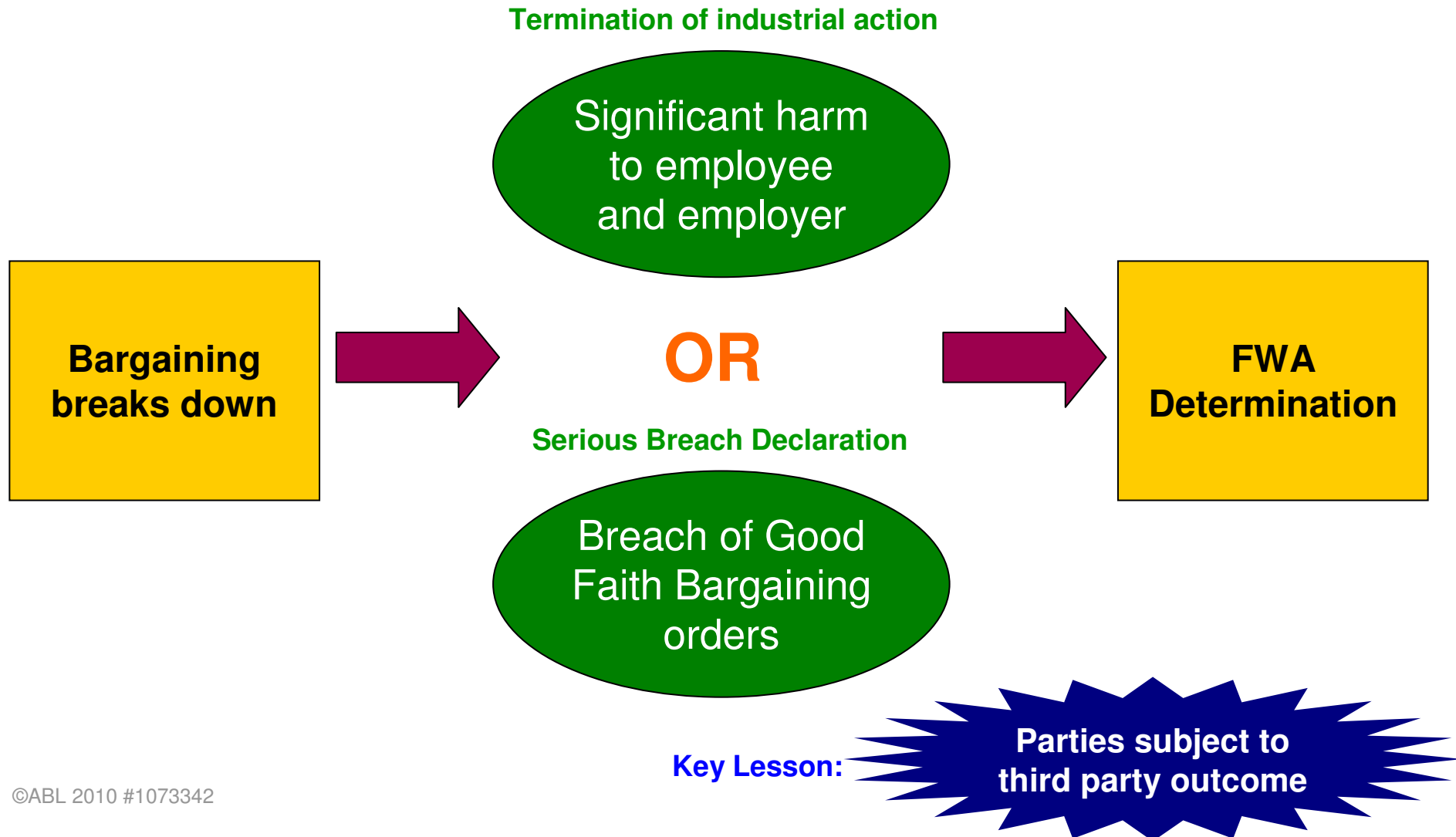
### **BUT NO OBLIGATION TO :**

- **make concessions**
- **reach agreement**

Key Lesson:

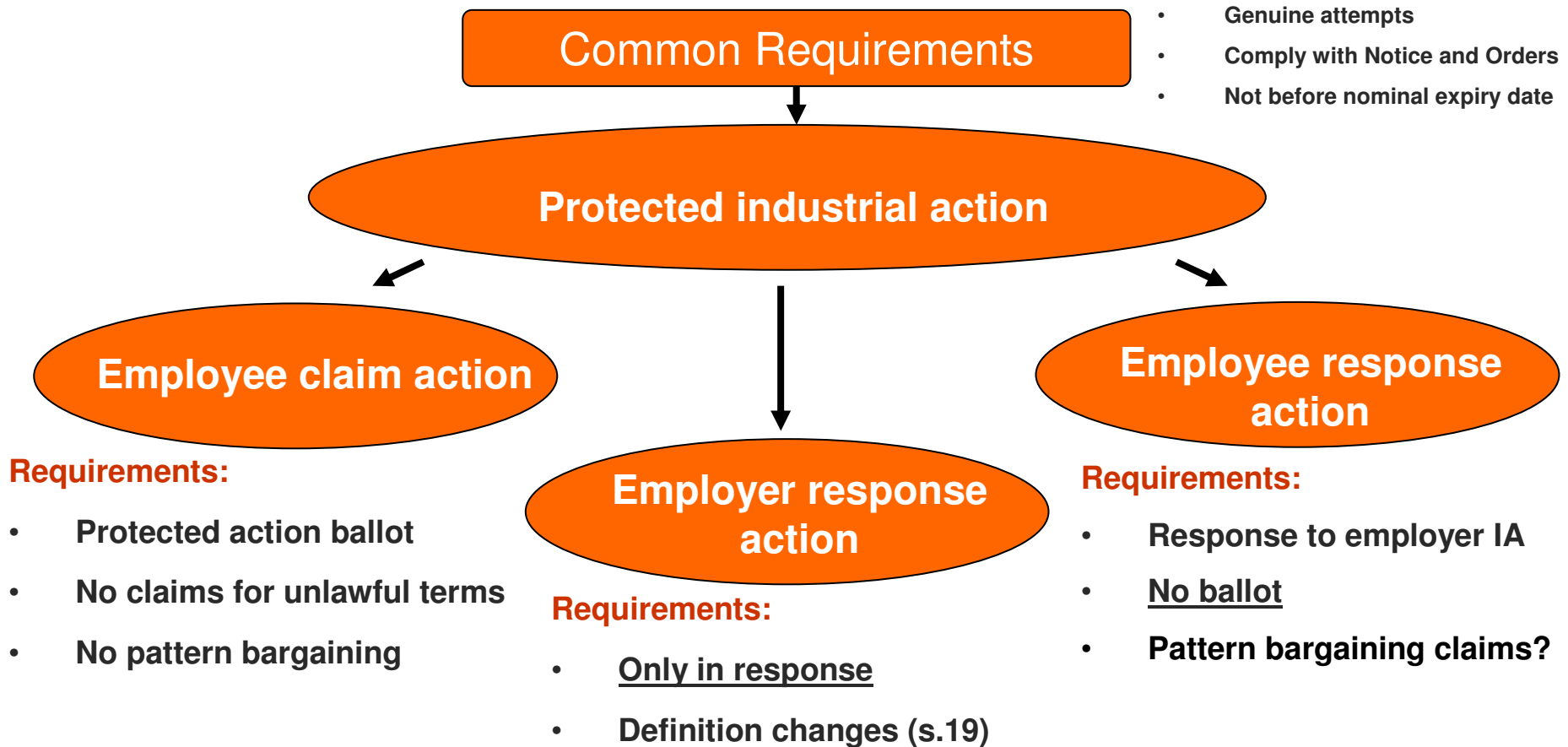
**Plan for being compelled to participate**

## Bargaining orders and serious breach declarations





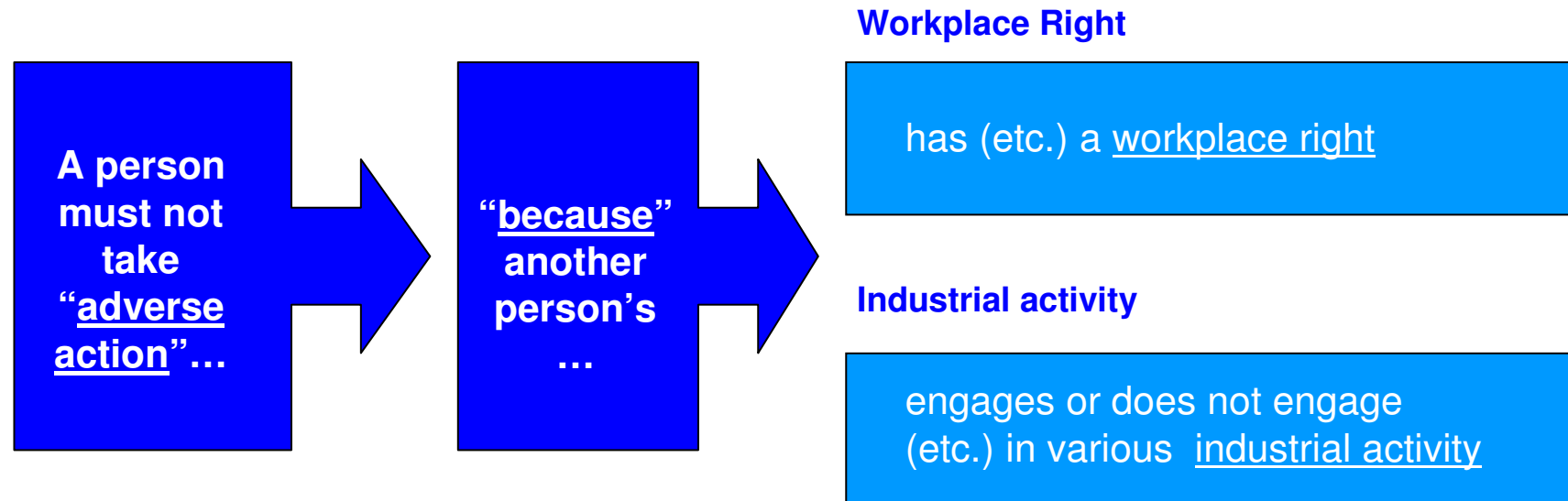
## Increased control over industrial action



Key Lessons:

**Timing/Conduct**

## General Protections



### Issues to consider:

- Particular relationships
- Objective of protection
- Reverse onus: cause vs reason
- ALL employees
- Process or Proceeding under workplace law

### Note other new protections re:

- Discrimination
- Coercion & undue influence
- Misleading conduct; and
- Sham arrangements



---

# Shifting Leverage: Leverage Under the New Framework





## ACTU agenda

---

Collective bargaining remains the core strategy for members to improve their situation.

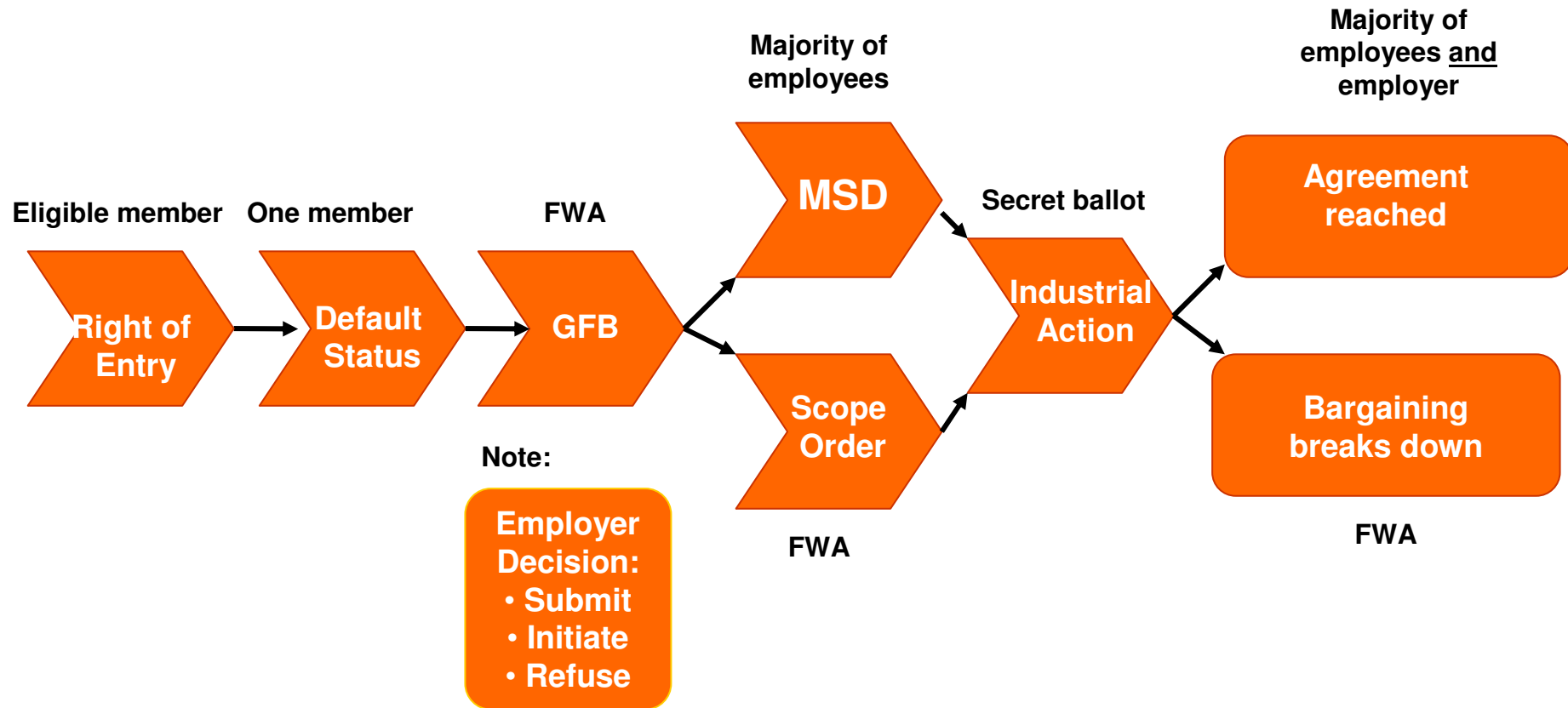
...

Effective on-the-ground organising remains essential.

**- Your Rights At Work  
February 2008**



# The new engagement framework in action





## Good Faith Bargaining in action

---

### Three key implications:

- Justification of position: request for information
- No bypass of bargaining representatives
- Other unilateral options reduced



## Justification in practice

---

Dear [redacted]

### Good faith bargaining: request for information

In our recent discussions the AMWU proposed a wage increase of 5% each year over the life of the agreement. [redacted] has rejected this, claiming the company could not pay more than 2% from date of signing until March 2010.

You will be aware that under your good faith bargaining obligations in the *Fair Work Act 2009*, you have an obligation to give genuine consideration to proposals put to you in negotiations, give reasons for your responses to them, and disclose relevant information in a timely manner.

Further to your obligations, and in order to assist in formulating our collective bargaining claim, we request that you provide us with the following information:

- the latest consolidated financial accounts for the business (and all related entities);
- a breakdown of the wage and salary portion of the consolidated financial accounts for the business over the duration of the last enterprise bargaining agreement entered between [redacted] and [redacted] – including wage and salary earners and specification of the proportions paid to executive and non-executive employees;
- The budget for the business over the next 4 years;
- a breakdown of the wage and salary portion of that projected budget, including wage and salary earners and including specification of the proportions projected for executive and non-executive employees;
- Any proposals for changes to the way the business operates (including restructures, redundancies, outsourcing or in-sourcing plans) in the next 4 years:



## Justification in practice

---

- Any proposals for changes in the ownership or management of the business in the next 5 years;
- Any information on the financial position of the competitors of the business.

We understand that some of this material may be genuinely confidential. If that is the case, we undertake to keep that material strictly confidential between ourselves. We would be prepared to sign a legal undertaking to that effect.

For other material that is not genuinely confidential, we undertake to treat that material sensitively, and to treat any personal information in accordance with privacy principles. We would only disclose that information to members for their feedback, and not to anybody else. Again, we would be prepared to sign a legal undertaking to that effect.

Please confirm, within 7 days, that you will provide us with the information we are requesting. If you would like us to sign any undertakings as to confidentiality in respect of particular documents, in your response please identify:

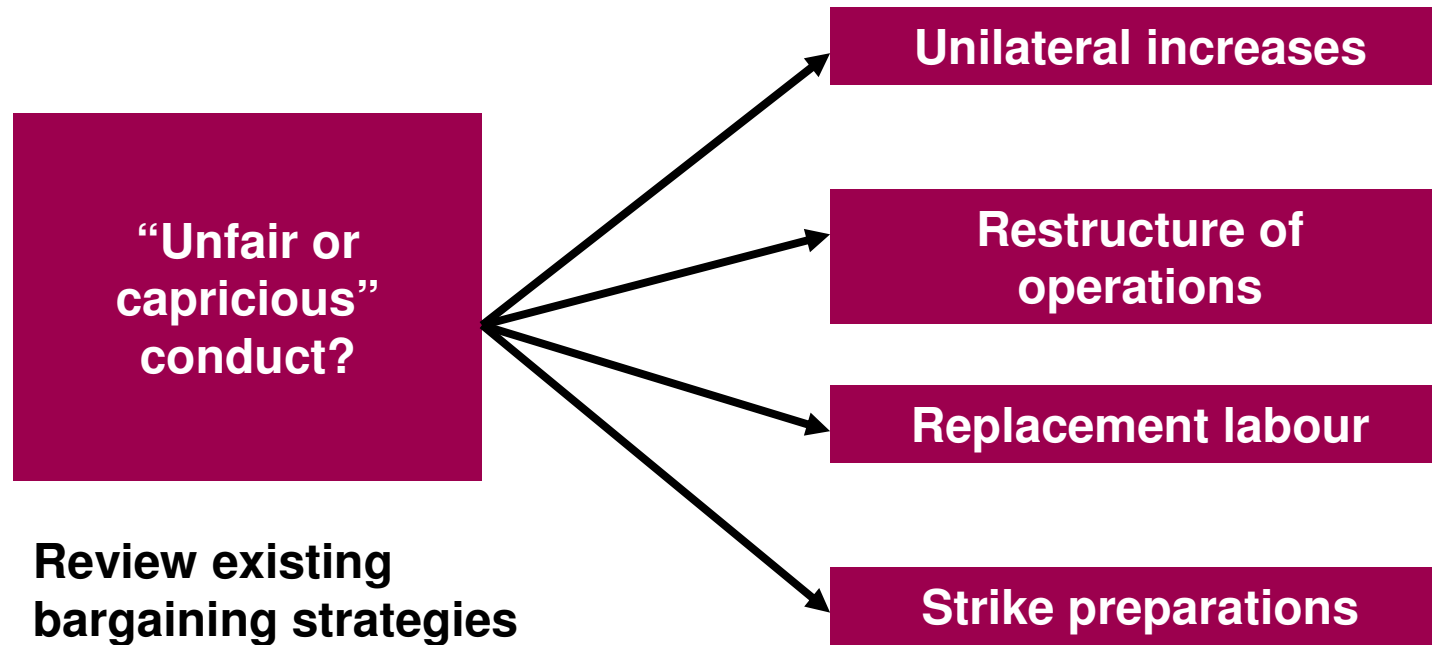
- which documents you would like to be treated confidentially; and
- your explanation as to why the documents are genuinely confidential.

Yours sincerely



## Unfairness in practice?

---





---

## The case for further reform

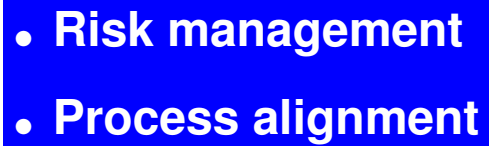


## Assessing the impact on status quo

---

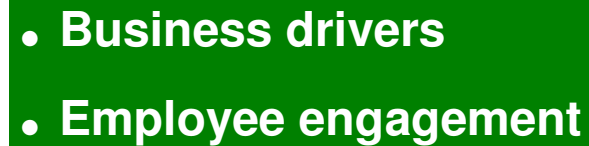
A large blue oval containing the word 'Governance' in white text.

### Governance

- 
- A blue rectangular box containing two white bullet points.
- Risk management
  - Process alignment

A large green oval containing the word 'Strategic' in white text.

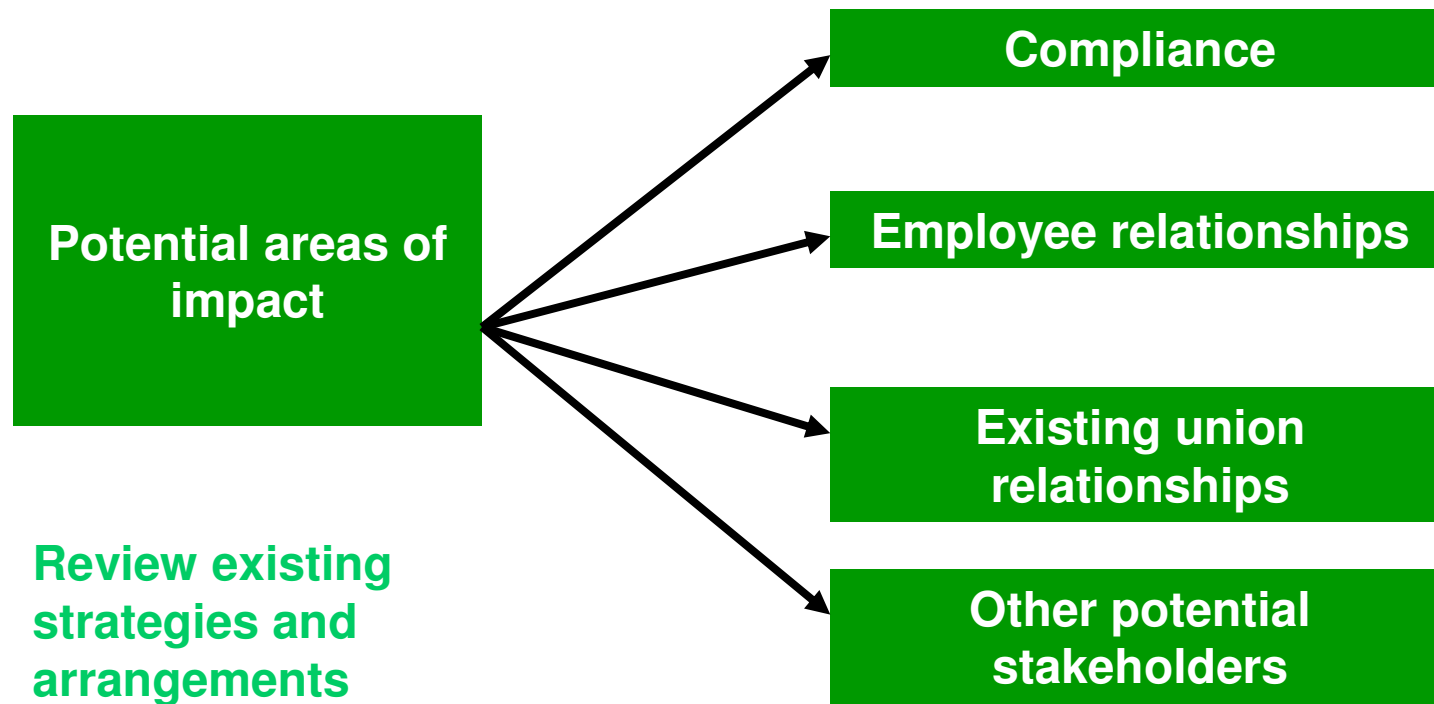
### Strategic

- 
- A green rectangular box containing two white bullet points.
- Business drivers
  - Employee engagement



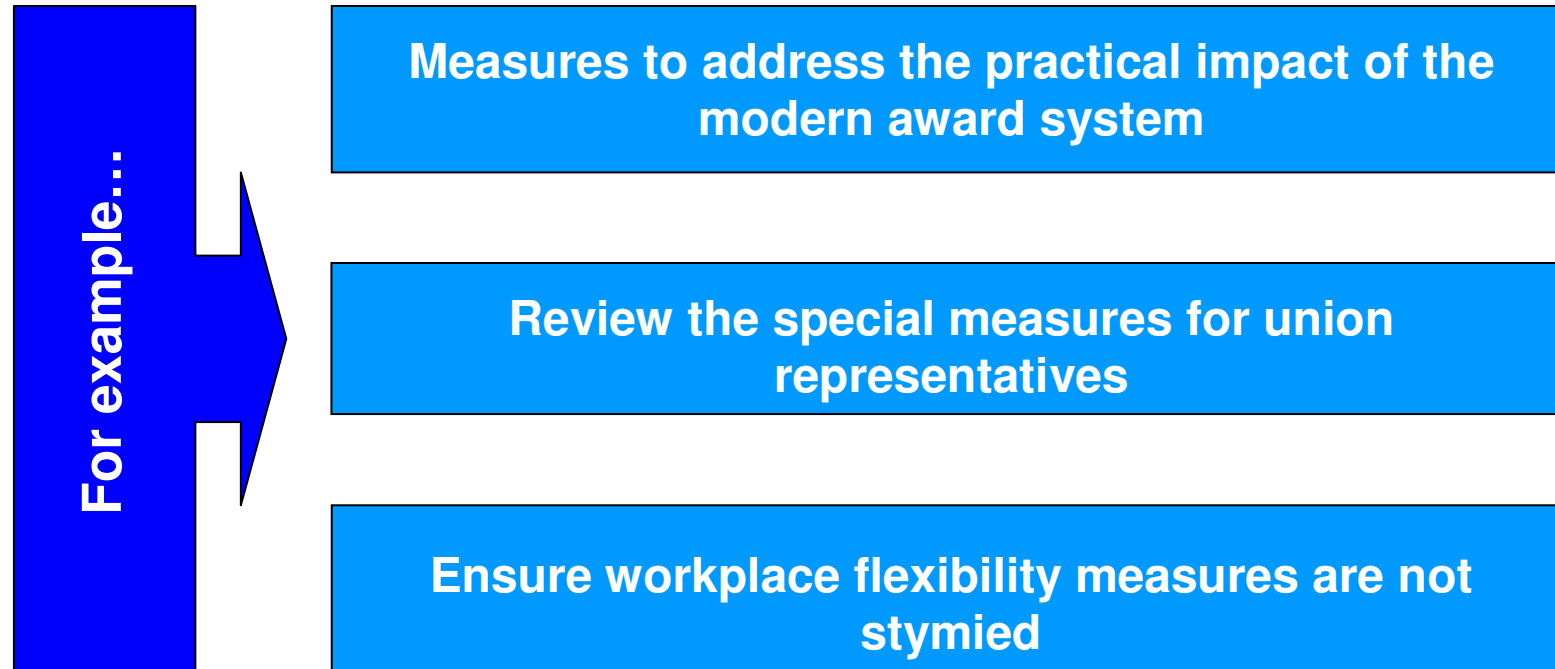
## Developing a strategy

---



## Critically Assess the Fair Work Act

---





## Formulating good policy

---

### **Burying the Work Choices mantel:**

- Good policy must not be burdened or constrained by bad politics.
- Critically examine the Fair Work Act as it now operates in practice.
- Develop new modes to communicate industrial relations policies



---

## Questions...

**Henry Skene** | Partner

T: +61 3 9229 9807 | F: + 61 3 9916 9587 | M: 0411 478 758

hskene@abl.com.au | [www.abl.com.au](http://www.abl.com.au)

Not for circulation or publication without the prior written approval of Arnold Bloch Leibler Lawyers and Advisors. This presentation deals with general matters and should not be relied upon as advice in a particular context.

©ABL 2010 #1073342

